IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 338 of 1996

1. Shankar Bandu Desai
2. Baban Bandu Desai ... Appellants
(Orig. Defts)

V/s

Baburao Pandurang Bhavake .. Respondent
(Orig. Plff)

Shri R.G.Ketkar for Appellant
Shri R.V.Bansode for Respondent

CORAM:S.R.SATHE,J.
DATED:23rd August 2006

ORAL JUDGMENT :-

1. The Appellants original defendants in Regular Civil Suit No.162 of 1987 have preferred this appeal against the judgment and order passed by the Court of Second Additional District Judge, Satara in Regular Civil Appeal No.251 of 1993 whereby the order passed by the 2nd Joint Civil Judge, J.D., Karad dismissing

the Plaintiff's suit for permanent injunction was set aside and appeal was allowed and defendants were restrained perpetually from interfereing with possession of the plaintiff's suit land bearing Block No.4153 as described in para 1 of the plaint.

2. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and defendants.

3. Brief facts giving rise to this appeal are as under :

. The suit land described in para 1 of the plaint was initially owned by Bandu Gopala Desai, father of the defendant nos.1 to 3 and Bala Gopal Desai, father of the defendant no.4. Plaintiff's father Pandurang Kondiba Bhavake and plaintiff's uncle Bandu Kondiba Bhavake purchased the suit property under registered sale deed dated 5-3-1957 for Rs.5,000/- and started cultivating the said land. It is plaintiff's case that entry with regard to the said sale transaction was not properly made in the record of rights. The name of plaintiff's father and uncle ought to have been entered in Kabjedar column, however, through mistake it was entered into the other rights column. The relations between the plaintiff's father and defendant's father were cordial and as such they did not give any attention to the said entry.

4. The father of the defendant nos.1 to 3 died on 6-10-1978 while father of the defendant no.4 expired on 3-7-1980. Plaintiff's father expired on 20-5-1979. After the death of plaintiff's father and defendant's father name of legal heirs were entered in the record of rights. Since then the defendants started harassing the plaintiff. Not only that but in the year 1982 the defendants' committed theft of hybrid crop sown by the plaintiff in the suit land. For that purpose plaintiff lodged a complaint in the Court of J.M.F.C., Karad. When plaintiff searched the revenue record in respect of the suit land, he noticed that plaintiff's name was deleted on the basis of the application made by the defendants. Plaintiff, therefore filed Appeal No.16 of 1983 before Tahasildar, Karad. By virtue of the order passed in the same, mutation entry No.2797 which was in favour of the defendants was cancelled. According to the plaintiff, previously, when defendants had obstructed plaintiff's possession he had filed suit against defendants and interim injunction was also granted in the same. However, thereafter the defendants promised that they would not create any trouble and obstruct the plaintiff. Plaintiff, therefore, relied on the said statement and did not give any attention to the suit filed by him. As a result of the same the said suit was dismissed for default.

5. It is plaintiff's case that on 11-4-1987 the defendants gave threat that they would see as to how he would enter in the suit land, not only that but they have also abused the plaintiff and obstructed him in sowing the said land. The plaintiff therefore filed suit for permanent injunction against the defendants' in the Court of the C.J.J.D., Karad on 27-4-1987.

6. The defendants filed their joint written statement at Exh.16 and opposed the suit claim. They firstly contended that the description of the suit property given by the plaintiff is not correct. According to them plaintiff's father and uncle had advanced loan of Rs.5,000/- to the defendants' father and the alleged sale deed dated 5-3-1957 was executed by way of security. The possession of the suit land mentioned under the sale deed was in fact not given to the purchaser i.e. father of the plaintiff and as such the names of the plaintiff's father and uncle were entered in other rights column. According to the defendants, the plaintiff and his predecessor were fully aware about the said entry but they never took any immediate action against the same. The defendants further contended that the suit land was all along in possession of the defendants and their predecessor in title. Not only that but according to them they even

repaid the amount of loan of Rs.5,000/- to the plaintiff's predecessor in title in the year 1970. As the defendants were in actual possession of the suit land in the year 1973-74 when consolidation scheme was made applicable to the suit land the name of the defendants were entered as owners to the suit land. According to them as relations between the plaintiff's father and their father were cordial document of reconveyance was not executed. Taking advantage of the said situation plaintiff obtained signatures of the defendants on blank paper in the year 1982 and on that basis plaintiff got his name entered in the record of rights.

7. The defendants further contended that as the plaintiff's earlier suit for permanent injunction bearing No. 336/1983 was dismissed for default, plaintiff was in fact not entitled to file present suit and the same is not maintainable. They further contended that they have preferred RTS Appeal No.107 of 1986 before S.D.O. Satara regarding the order passed by the revenue authorities as a result of which the plaintiffs' name was entered in the record of rights. The defendants further contended that as their names were entered to the suit land even after application of the consolidation scheme, plaintiff is not entitled to make any grievance about the same in the civil court and the civil court has no

jurisdiction to try present suit. They also denied plaintiff's allegations that they committed theft of the crop of the plaintiff's land. Thus, according to them, the suit land was all along in their possession and prior to that it was in possession of their predecessor in title and on the date of the suit plaintiff was not at all in possession of the suit land. Hence on all these grounds the defendants prayed for dismissal of the suit.

8. From the perusal of the record it appears that subsequently the defendant nos 2 and 4 submitted an application stating therein that they are not concerned with the suit land, they never obstructed the plaintiff's for his possession over the said land. Thus, they in fact supported the case of the plaintiff. They therefore prayed that their names be deleted. Accordingly, their names have been deleted.

9. On these pleadings the learned trial Judge famed issues at Exh.90. In order to prove the suit claim plaintiff Baburao Bhavke examined himself at Exh.155 and produced certain documents including original sale deed Exh.133. As against this the defendants did not adduce any oral evidence.

10. After considering the evidence on record the learned trial Judge came to the conclusion that on the

date of the suit plaintiff was not in actual possession of the suit land, Hence he dismissed the plaintiff’s suit.

11. Being aggrieved by the said order the plaintiff filed Regular Civil Appeal No.251 of 1993. After hearing arguments of both the learned Advocates the learned 2nd Additional District Judge, Satara came to the conclusion that the plaintiff has proved his lawful possession of the suit property on the date of filing of the suit and as such he is entitled for the permanent injunction as prayed. Naturally, he allowed the appeal and decreed the plaintiff’s suit for permanent injunction.

12. The above mentioned order is challenged in the present second appeal.

13. While admitting this apeal, this Court has passed the following Order on 16-8-1999.

> "Ground nos.(h), (i) and (l) raised substantial questions of law. Hence the appeal is admitted".

. The said grounds are as under :

h) Whether the suit instituted by the

respondent, being Regular Civil Suit No.160 of 1987, itself is maintainable as the earlier suit filed by him viz. Regular Civil Suit No.336 of 1983 in respect of the same cause of action was dismissed for default?

i) Whether the Courts below failed to appreciate that the respondent had instituted the earlier suit viz. Regular Civil Suit No.336 of 1983 for injunction as well as for recovery of possession, which itself shows that he was not sure of his possession and, therefore, ought to have dismissed the suit?

l) Whether the appellate Court was justified in reversing trial courts decree where the suit land was not identifiable?

14. In this appeal before me Shri Ketkar, learned Advocate for the defendants has urged three points. Firstly, he submitted that as the plaintiff had filed Regular Civil Suit NO.336 of 1983 against the present defendants for permanent injunction in respect of suit land and the same was dismissed for default the present suit is in fact not maintainable in view of the provisions of Order 9 Rule 9 of Code of Civil Procedure. Secondly, he canvassed before me that the

learned first Appellate Court has not properly appreciated the evidence on record and merely on relying on the sale deed held that on the date of the suit plaintiff was in possession of the said land. Lastly, he submitted that the plaintiff has in fact not given the proper discretion of the suit land and the plaintiff is having only half share in the suit land an as such no executable order could be passed. He, therefore, submitted that the appeal be allowed and judgment and order passed by the first appellate court be set aside and plaintiff's suit be dismissed.

15. As against this, Shri Bansode, learned Advocate for the plaintiff supported the judgment and order passed by the learned first appellate Court.

16. It is not in dispute that the present plaintiff had filed Regular Civil Suit NO.336 of 1983 against the present defendants for permanent injunction in respect of the suit and the said suit was dismissed for default on 25-1-1986. Shri Ketkar, learned Advocate for the defendants submitted that present suit itself is not maintainable and is barred by the provisions of Order 9 Rule 9 of Code of Civil Procedure. It is worthwhile to see what the said provision say:-

(1) Where a suit is wholly or partly

> dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

17. Shri Ketkar,learned Advocate for the plaintiff also submitted that in the instant suit plaintiff has not made out any new cause of action. In fact he has only changed date alleging that defendants obstructed him in cultivation of the suit land on 11-4-1987, otherwise there is no change in the earlier suit and the present suit. So, according to him though only technically it is shown that the cause of action is different in the present suit in fact the new suit is in respect of same cause of action on which the earlier suit was filed. In order to substantiate his proposition he has placed reliance on 2 rulings. Firstly, on a case Pratapchand Lakhamaji Jain V/s Smt. Lilabai Krishnanath Surve **1998 (3) Mh.L.J.252**. I have

carefully gone through the said authority. The facts of the said case and the facts of the case in hand are quite different. In that case landlord had filed a suit for recovery of the land against the defendant which was based on the notice dated 13-1-1982. As the said suit was dismissed for default, subsequent suit was filed and the same was also based on the notice dated 13-1-1982. So, under these peculiar circumstances it was held that the said suit is not maintainable. However, in the instant case, though the earlier suit was filed for injunction and the present suit is also for injunction it cannot be said that the same is filed for the same cause of action. We cannot ignore the fact that the cause for filing a suit for injunction arises as and when the other side obstructs the plaintiff in performing his lawful right. The defendant has specifically stated that after the filing of the earlier suit the defendants had promised that they will not obstruct the plaintiff's possession. He therefore did not pursue the suit and also did not give any further attention to it. As a result of the same, the suit was dismissed for default. However, in the present suit he has categorically stated that subsequently the defendants asked the plaintiff to give the land on the share basis and when he refused the defendants threatened him on 11-4-1987 and also obstructed him in ploughing the suit land. So, on 11-4-1987 there was

definitely fresh cause of action accrued in favour of the plaintiff and as such he filed a fresh suit. So, under these circumstances the above mentioned ruling is of no help to the defendants.

18. The learned Advocate for the defendants has also placed reliance on a case Suraj Rattan Thirani and Ors. V/s Azamabad Tea Co. Ltd and Ors. **AIR 1965 SC 295**. It is true that in this case Their Lordships of the Apex Court have made the following observations:

> " Order 9 Rule 9 of Civil P.C. precludes a second suit in respect of "the same cause of action" where the first suit is dismissed for default of appearance of the plaintiff. In considering whether the cause of action in the subsequent suit is the same or not, as the cause of action in the previous suit, the test to be applied is "are the causes of action in the two suit in substance and not technically identical. Thus, the term "cause of action" is to be construed with reference rather to the substance than to the form of action."

19. However, it must be noted that in the above mentioned reported case the earlier suit was filed for possession on the basis of title, the subsequent suit

was also filed for possession on the basis of title. The only difference in the subsequent suit was that there was claim with regard to other 2 persons who were co-sharers and not parties in the earlier suit. So, while considering the said facts the Apex Court has made the above observations and held that the suit in respect of those persons who had filed earlier suit for themselves second suit is not maintainable. Thus, in that suit in substance there was no fresh cause of action. However, in the instant case the plaintiff has specifically averred that fresh cause of action to restrain defendants accrued on 11-4-1987 as they gave threats to him on that day and said that they would not allow Plaintiff to enter the said land and obstructed him in plying the suit land. So, the ratio of the above ruling is of no help to the present defendants. Considering these facts I have no hesitation to hold that there is no substance in the argument advanced by the learned Advocate for the defendants in this behalf.

20. It is not in dispute that the suit land was initially owned by Bandu Desai and his brother Bala Desai and they sold the said land to plaintiff's father Pandurang and his brother Bandu by virtue of the registered sale deed dated 5-3-1957. It must be noted that the defendant has contended that real transaction under the said deed was not of sale and

that amount was advanced by plaintiff's father to the defendants' father and by way of security the said document was executed and that subsequently the said amount was also repaid by the end of 1970. However, as the relations between plaintiff's father and defendants' father were cordial document of reconveyance remained to be executed. However, it must be noted that the defendants have not at all adduced any evidence in support of this contention. None of them has entered into witness box to prove the contentions taken by them in written statement. Naturally, even their contention that the suit land was not put in possession of the purchaser as per sale deed also cannot be accepted because in the sale deed it is clearly mentioned that land in question is given in possession of the purchaser. So, defendants' contention in that behalf cannot be accepted and adverse inference has to be drawn against the defendants. In a case Vidhyadhar V/s Mankikrao and another **AIR 1999 SC 1441** Their Lordships have observed that :

> "where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct."

. So, relying on the above mentioned ruling and considering the facts and evidence on record I have absolutely no hesitation to hold that the contention taken by the defendants that the plaintiff's father had not received actual possession is not correct. Merely because in 7x12 extract names of purchaser and subsequently his legal heirs were not shown in the column of cultivation one cannot jump to the conclusion under the facts and circumstances of the case that purchaser had never received the possession. Incidently, it must also be noted here that when plaintiff's came to know that their names have been entered in the record of rights they had moved the revenue authorities and accordingly necessary corrections were made and the names of the plaintiffs have been entered in the record of rights. So, the learned first Appellate Court has rightly held that the plaintiff has proved their possession of the suit land on the date of the suit.

21. The learned Advocate for the plaintiff argued before me that in the instant case plaintiff himself has stated that he is having 8 annas share but he has not specifically stated as to which exact portion he is holding as of his share and as a result of the same no effective executable order can be passed in this matter. It is true that plaintiff has stated that he

is having 8 annas share in the land bearing Block No.4153. It is equally true that he has not specifically stated that he is having particular portion of Block No.4153 in his possession. However, from the evidence on record it is very clear that property in question was purchased by plaintiff's father Pandurang and his brother and after the death of both of them the property was inherited by their respective heirs. Thus, it has come on record that plaintiff's cousin brother is also having 8 Annas share in the suit property. Thus, it can be said that the property was jointly owned by the father of the plaintiff and his uncle and now it is owned by the plaintiff and his cousin brother. It therefore means that plaintiff and his cousin brother are the co-owners having equal undivided share in the suit land bearing Block No.4153. As plaintiff was having half share in the suit land that does not mean that in the absence of plaintiff bringing on record as to which exact portion he is holding, no effective order can be passed. As two co-sharers are having equal share in the suit property and it is not even the case of the defendants that any partition has taken place between them, it has to be held that the plaintiff is in lawful possession of the suit land. The plaintiff is claiming relief of permanent injunction in respect of entire Block No.4153. So, there is no substance in the argument advanced by the learned Advocate for the

defendants in this behalf. Even if permanent injunction as prayed is granted and the defendants are restrained from obstructing plaintiff's possession of the suit land it would serve the purpose because so long as partition has not taken place between plaintiff and his cousin brother plaintiff is entitled to protect his possession over the entire suit land.

22. Thus, from the evidence on record it is crystal clear that plaintiff has proved that the suit land was in his possession on the date of the suit and there was no leal bar in filing the suit for injunction against the defendants. The learned 2nd Additional District Judge,Satara has appreciated the evidence in its proper perspective. There is no error of law in the order passed by him. Hence there is no necessity to interfere with the said findings.

23. In this view of the matter, there is no substance in this appeal. The appeal is dismissed with costs.

(S.R.SATHE,J.)

. At this stage Shri Ketkar, learned Advocate for the Appellant submits that during the pendency of this second appeal by virtue of order passed by this Court execution and operation of the order passed by the 2nd

Additional District Judge, Satara in appeal was stayed and the Appellant desires to challenge this order in superior Court and as such the ad-interim order passed on 29-11-1996 be continued for further period of 8 weeks.

. Considering all the facts and circumstances and the fact that for last about 10 years interim stay was in operation the said interim order is to continue for a period of 4 weeks from today.

(S.R.SATHE,J.)